314 U.S. 50
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 351

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ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

And Companion Cases.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit, and

SUPPORTING BRIEF.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No.....

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,802; C. C. A. No. 11,816.)

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11802; C. C. A. No. 11,817.)

ANHEUSER-BUSCH, INCORPORATED, Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,803; C. C. A. No. 11,818.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,804; C. C. A. No. 11,819.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,805; C. C. A. No. 11,820.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,806; C. C. A. No. 11,821.)

WILLIAM L. PARKER, Receiver of and for ANHEUSER-BUSCH ICE AND COLD STORAGE COMPANY, INCORPORATED, a corporation formerly existing under the laws of Virginia, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,806; C. C. A. No. 11,822.)

MELROSE ICE CREAM CORPORATION, a Corporation formerly existing under the laws of the State of New York, ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the last Board of Directors and Trustees for the Creditors and Stockholders of Melrose Ice Cream Corporation, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,807; C. C. A. No. 11,823.)

MELROSE ICE CREAM CORPORATION, a Corporation formerly existing under the laws of the State of New York, ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the last Board of Directors and Trustees for the Creditors and Stockholders of Melrose Ice Cream Corporation, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,807; C. C. A. No. 11,824.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED, Petitioners.

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,808; C. C. A. No. 11,825.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,809; C. C. A. No. 11,826.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.

(D. C. No. 11,810; C. C. A. No. 11,827.)

C. D. RUSSELL, Liquidator of ANHEUSER-BUSCH ICE CREAM AND BEVERAGE COMPANY, a corporation formerly existing under the laws of Louisiana, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,810; C. C. A. No. 11,828.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,811; C. C. A. No. 11,829.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,812; C. C. A. No. 11,830.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,813; C. C. A. No. 11,831.)

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, surviving members of the last Board of Directors and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the laws of Oklahoma, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,813; C. C. A. No. 11,832.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED,
Petitioners,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

(D. C. No. 11,814; C. C. A. No. 11,833.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,
v.
LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.
(D. C. No. 11,815; C. C. A. No. 11,834.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED, Petitioners.
v.
LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.
(D. C. No. 11,816; C. C. A. No. 11,835.)

SPRINGFIELD ICE AND REFRIGERATING COMPANY, and ANHEUSER-BUSCH, INCORPORATED, Petitioners,
v.
LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri, Respondent.
(D. C. No. 11,816; C. C. A. No. 11,836.)

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, ANHEUSER-BUSCH, INCORPORATED, WILLIAM L. PARKER, Receiver of and for Anheuser-Busch Ice and Cold Storage Company, Incorporated, a corporation formerly existing under the laws of the State of Virginia, MELROSE ICE CREAM CORPORATION, a corporation formerly existing under the laws of the State of New York, ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER and WILLIAM J. LANDES, Surviving Members of the Last Board of Directors, and Trustees for the Creditors and Stockholders of said Melrose Ice Cream Corporation, C. D. RUSSELL, Liquidator of Anheuser-Busch Ice Cream and Beverage Company, a corporation formerly existing under the laws of the State of Louisiana, ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, Surviving Members of the Last Board of Directors and Statutory Trustees for the Creditors and Stockholders, of New State Ice Company, a corporation formerly existing under the Laws of

the State of Oklahoma, and SPRINGFIELD ICE AND REFRIGERATING COMPANY, respectfully pray that a Writ of Certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit entered on May 29, 1941 (R. 1161), in each and all of the above-entitled causes, being causes Nos. 11,816 to 11,836, both inclusive, on the docket of said Circuit Court of Appeals, which judgment reversed several judgments for respective petitioners in the aggregate amount of $123,-179.46, entered on March 7, 1940, in and by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, for the refund of federal income taxes for the years 1924, 1925 and 1926, and affirmed certain judgments in favor of the Collector, entered on the same day by said District Court (cf. District Court's Directions for Judgments, R. 587, 590-592).

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., § 347). The judgment of the Circuit Court of Appeals was entered on May 29, 1941 (R. 1161). A petition for rehearing (R. 1169), filed on June 13, 1941, was entertained by said Circuit Court of Appeals and denied on June 23, 1941 (R. 1183).

QUESTIONS PRESENTED.

The petitioner, Anheuser-Busch, Incorporated, had, prior to National Prohibition, developed a nonalcoholic cereal beverage called "Bevo," designed for marketing in dry territories, which attained large-scale production from 1916 to 1918. This product was manufactured by an "arrested fermentation" process, and marketed in odd-shaped

10-ounce bottles, under governmental regulations which did not permit the use of the "de-alcoholizing" process (excepting upon payment of a beer tax) and which required the use of a container plainly distinguishable from the 12-ounce bottle used for the marketing of beer. After 1918 near beer, manufactured by the "de-alcoholizing" process under changed regulations, virtually superseded the product Bevo, and during 1920 and 1921 large supplies of Bevo cases and bottles returning from the trade were accumulated and stored. *During the years 1921 to 1923, both inclusive, such accumulated cases and bottles were reserved for the marketing of new products then being developed. In 1924 it became apparent that the new products were failures.* The surplus cases and bottles were never thereafter used again. They were not readily salable.

The primary questions in the case are:

1. Whether, under the circumstances above stated, taxpayers were entitled to deductions for obsolescence of Bevo cases and bottles in the years 1924 and 1925 under Section 234 (a) (7) of the Revenue Act of 1924.

2. Whether, under the circumstances above stated, taxpayers were entitled to deductions for loss of useful value of Bevo cases and bottles in the years 1924 and 1925 under Section 234 (a) (4) of the Revenue Act of 1924.

Secondary questions, not ruled upon by the Circuit Court of Appeals, would be presented upon sustention of taxpayers' claims to deductions for obsolescence or loss of useful value.

As of June 30, 1925, Anheuser-Busch, Incorporated, a corporation organized in 1875, whose charter was about to expire, transferred all of its assets subject to its liabilities to a new corporation of the same name, which had

been organized by the stockholders of the old corporation. Such stockholders held the same proportionate interests in the new corporation which they had held in the old. The sole purpose of such reincorporation was to continue the business of the old corporation under Missouri Statutes which provided no means for extension of the old charter.

The secondary questions presented under such state of facts are:

3. Whether Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924, so as to enable net losses of the former incurred in 1924 to be offset against income of the latter in the last half of 1925 and in 1926.

4. Whether, if the District Court was in error in holding that said corporations were the "same taxpayer," taxpayers may have enhanced judgments resulting from the treatment of the two corporations as separate taxpayers.

Questions 3 and 4 do not affect all of the judgments rendered by the District Court, but only those which are for the recovery of overpayments for 1925 and 1926 and result from the application of loss carry-overs.

STATUTES AND REGULATIONS INVOLVED.

The statutes here involved are:

Section 234 of the Revenue Act of 1924 (43 Stat. 283), the pertinent portions of which read as follows:

> "Sec. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: * * *

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise. * * *

"(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * *"

Section 206 (b) of the Revenue Act of 1924 (43 Stat. 260), which reads as follows:

"Sec. 206 (b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

The regulations here involved are:

Article 166 of Regulation 65, reading as follows:

"Obsolescence.—With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because,

in the opinion of a taxpayer, the property *may* become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and cannot be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due."

Article 143 of Regulations 65, reading as follows:

"Loss of Useful Value.—When, through some change in business conditions, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis and the salvage value of the property. In determining the amount of the loss, adjustment must be made, however, for improvements and for depreciation. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories or to other than capital assets. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be charged off on the books and fully explained in returns of income."

SUMMARY STATEMENT OF MATTER INVOLVED.

The Facts.

The facts touching upon the primary issues of obsolescence or loss of useful value, as found by the District Court, may be summarized as follows:

The chief business of Anheuser-Busch, Incorporated, prior to the advent of National Prohibition, was the manufacture and sale of beer (R. 577).

Commencing in 1908, Anheuser-Busch, Incorporated, developed a product, Bevo, which was a malt beverage free from alcohol, manufactured by an arrested fermentation process, for the purpose of finding a market for a non-alcoholic beer-like beverage in local-option territories and government reservations (R. 577).

Governmental regulations at that time and until 1916 required that near-beer be made on premises segregated from the premises upon which beer was made, and that it be marketed in packages unlike those ordinarily used for containing fermented liquor. Unless the product was made by a process under which at no time during manufacture more than one-half of 1 per cent of alcohol was contained therein, it was taxed as beer (R. 578).

Bevo was manufactured on a large scale in 1916 and reached peak production in 1918 (R. 578).

For the purpose of marketing Bevo, Anheuser-Busch, Incorporated, during the years 1916 to 1919, both inclusive, acquired 2,899,774 Bevo cases at an aggregate cost of $2,731,332.48, and purchased or manufactured 666,066 gross of Bevo bottles at an aggregate cost of $1,794,023.49. The prices paid for the cases ranged from 85½¢ in 1916 to $1.03 in 1918. The prices for the bottles ranged from $2.40 per gross in 1916 to $3.85 per gross in 1918. The bottle

adopted for the marketing was a 10-ounce bottle of unusual shape, differing materially from the tall 12-ounce bottle used for the marketing of beer. The Bevo cases were built to accommodate the shorter bottles (R. 578).

At the time Bevo sales were made only the liquid content was sold and deposits were taken for the return of the cases and bottles. As empty cases and bottles were returned customers were given refunds at the rate of the deposits charged (R. 579).

Sales of Bevo suffered drastic declines after 1918. From a volume of 10,449,152 dozen bottles in 1918, sales fell to 3,904,316 dozen bottles in 1919. Sales fell again from 3,044,006 dozen bottles in 1920 to 794,378 dozen bottles in 1921 (R. 578).

The immediate cause of the decline of sales of Bevo after 1918 was a change, the effect of which was then being experienced, in governmental regulations under which breweries were thenceforth permitted to produce near-beer by the manufacture of alcoholic beer and its subsequent de-alcoholization, and to market such near-beer in ordinary twelve-ounce beer bottles, the taxability of the near-beer being made to depend upon the alcoholic content at the time it was finished as distinguished from the alcoholic content during the process of manufacture. The quality of such de-alcoholized beer was better than that of Bevo, and competition required Anheuser-Busch, Incorporated, to introduce de-alcoholized Budweiser at the end of 1919 and to market it in beer bottles (R. 578-9). By the end of 1921 the company's officials recognized that the decline in volume of Bevo sales in comparison with sales of preceding years was permanent (R. 616).

Subsequently, during the Prohibition period, sales of

both Bevo and de-alcoholized Budweiser declined due to competition of illegal home-brewing (R. 579).

As a result of Prohibition, many breweries were compelled to cease business, but Anheuser-Busch, Incorporated, sought to employ its plant, capital and facilities in other industries, including the manufacture of non-alcoholic beverages, ice, ice cream, corn products and yeast (R. 579).

In August, 1918, the Board of Directors of Anheuser-Busch, Incorporated, had ordered the purchase of Bevo cases discontinued (R. 616). Consequent upon the falling off of Bevo sales after 1918, the returns of Bevo cases and bottles exceeded the shipments, and a gradual accumulation of Bevo cases and bottles requiring storage took place (R. 579). The surplus supplies of cases and bottles accumulated in excess of the quantities needed to supply the market for the beverage were stored in unused parts of the Bevo Building, a bottling plant, so far as available, then in other buildings and finally in exposed places (R. 581, 616). A schedule shows the quantities stored at the different types of locations (R. 473). Such accumulation continued until December 31, 1921 (R. 614).[1]

In the years 1920 through 1923 Bevo cases and bottles accumulated were held for use in the marketing of other beverages. Of such other beverages, the production of Ginger Ale was commenced in 1921, of Grape Bouquet and Grape Concentrate in 1922, and of Carcho in 1923 (R. 579). These products were marketed in Bevo cases and bottles (R. 579) and were developed with the hope of making use of such equipment (R. 617).

At the time of the introduction of Ginger Ale, Grape Bouquet, Grape Concentrate and Carcho there was no way

1 Physical "inventory sheets" showed the quantities of equipment from time to time on hand, both before and after the write-offs in controversy, but such inventory sheets were not the basis of any asset account and the figures therein were not entered on the books of account (R. 614-616).

in which the volume of production thereof and the requirements of cases and bottles therefor could be anticipated (R. 579).

Until the end of 1923, because of the reservation of the equipment for the marketing of other products, no effort was made by the management to sell supplies of empty cases and bottles excepting at prices comparing favorably with their costs or in instances where there were supplies of bottles without cases, the cases having been converted into beer cases (R. 579, 616).

In 1923 Anheuser-Busch, Incorporated, was forced by competition to give up using Bevo bottles for the purpose of marketing Ginger Ale and was compelled to adopt a different bottle for that purpose (R. 580).[2]

In 1924, after three years experience in the marketing of Grape Bouquet and Grape Concentrate and two years experience in the marketing of Carcho, the results from these products were disappointing, the total volume of sales of Bevo and of said new products not exceeding 12½% of the peak volume of Bevo sales in 1918 (R. 580). A schedule appended to the supplemental findings contains a summary of all products, and the quantities thereof, moving in Bevo bottles from 1916 to 1933 (R. 620).

After 1924 the company placed on the market several medicinal products, marketed in Bevo bottles, which were not expected to sell in great volume, but no other beverages (R. 617).

Beginning in December, 1923, efforts were made to sell empty Bevo cases and bottles (R. 580). On December 18, 1923, the Directors priced 100,000 Bevo cases and bottles

[2] The use of Bevo bottles for marketing ginger ale was discontinued in the middle part of 1923, the records showing the purchase of 12,000 dozen of green bottles on June 26, 1923 (R. 618).

at $1.00 per case, with its complement of two dozen empty bottles in each, but this price could not be obtained. Thereafter, on April 15, 1924, sale of the same quantity was authorized at 35¢ for each unit of one case and two dozen empty bottles (R. 580, 616-617).

At the end of 1924 the executive officers of the company determined that 749,897 two-dozen, ten-ounce Bevo cases and 3,271,160 dozen Bevo bottles were no longer required for the business of the corporation and that they had in said year become obsolete and had lost their useful value, and directed that the depreciated cost of such cases and bottles, less their remaining junk value, should be charged off on the books of the corporation as of December 31, 1924 (R. 580).

The charge-off made pursuant to such directions (R. 580) was computed as follows (R. 613):

Cost of 749,897 cases at $1.03 each.....		$ 772,393.91
Cost of 3,271,160 doz. 10-oz. bottles.....		885,096.95
Total cost claimed.....		$1,657,490.86[3]
Less:		
Salvage value assigned to cases, 5¢ each.....	$ 37,493.85	
Salvage value assigned to bottles, 5¢ doz.....	163,558.00	
Depreciation accrued on cases during prior years, 10¢ each.	74,987.70	276,039.55
Loss claimed		$1,381,451.31

At the end of 1925, the supply of cases and bottles reserved for use still remaining excessive, the executive offi-

[3] The costs of the cases and bottles were computed from the most recent invoices of purchases. This was based on an inspection revealing that most of the cases had seen little or no use (R. 436). Had average costs of acquisition been used, the cost basis of the cases and bottles would have aggregated $1,440,547.34 (R. 618). The District Court sustained the costs adopted by the taxpayers (R. 581).

cers of the company determined that 409,071 dozen Bevo bottles, in addition to those which were the subject matter of the write-off in 1924, were no longer required for the business of the corporation and that they had in 1925 become obsolete and lost their useful value, and directed that the cost of such bottles, less their remaining junk value, should be charged off on the books of the corporation as of December 31, 1925 (R. 581).

The charge-off which was made pursuant to such directions as of December 31, 1925, was computed as follows (R. 613):

Cost of 409,071 doz. 10-oz. bottles	$119,039.66[4]
Less:	
Salvage value assigned to bottles, 5¢ per doz.	20,453.50
Loss claimed	$ 98,586.16

All of the cases and bottles included in the write-offs were in sound and usable condition at the times they were stored and at the times of the write-offs (R. 581). About 10 per cent of them were new, and about 90 per cent were partly used (R. 581).

There was no way of identifying the used cases as part of any particular acquisitions (R. 616). It was estimated that the cases had made an average of two trips each (R. 618).

The District Court sustained as reasonable the determinations of the officers of the company that the cases and bottles had become obsolete and lost their useful value in the years when written off, after the failure of the products for the marketing of which they were reserved (R.

[4] Had average costs of acquisition been used, the cost basis of the bottles charged off would have been $91,815.99 (R. 618). Cf. note 3.

580, 581); and also sustained the computations of costs, junk values and depreciation[5] (R. 581, 582).

It found that the obsolescence had occurred as claimed (R. 582) and that taxpayers were entitled to deductions from income therefor (R. 583).

The cases and bottles which were the subject matter of the write-offs were in storage at locations where they were not readily accessible to the production facilities of Anheuser-Busch, Incorporated, and could not be used excepting upon incurrence of expense in hauling (R. 582). At the times of the write-offs they were not removed from the various locations where they had been stored, nor were they destroyed, sold or disposed of during 1924 and 1925, and the company continued in the ownership thereof (R. 617). No general instructions were given to the employees of the company to refrain from using the cases and bottles written off, but there was no need for their use (R. 619). There was nothing to prevent the use of the equipment at any time had there been a sudden increased demand for any beverage or product for which they were adapted (R. 619).

None of the cases and bottles included in the write-offs were ever used subsequently in the business of the com-

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[5] In computing the net losses claimed, the company took the position that depreciation on bottles should not be considered in the write-offs. This was on the theory that annual allowances for shrinkage in stocks of bottles were based upon breakage, abrasion and loss in the process of manufacture and in the hands of the trade, and had no relation to bottles in storage which were not subject to such breakage, abrasion and loss. According to expert testimony offered at the trial, the bottles were not subject to physical deterioration through aging or exposure when held in storage. The District Court made findings in conformity with such evidence (R. 582). Depreciation allowances in prior years had been on a per trip basis, varying from 3.4¢ to 5¢ per case shipped, and 1¢ to 2¢ per dozen bottles shipped (R. 618). In the write-offs this gauge was not applied to the bottles which had survived shipment, but was applied to the cases which were depreciated by 10¢ per case upon the assumption that all of the cases had made an average of two trips before they were stored, and that each case depreciated 5¢ in value as a result of each trip (R. 618).

pany excepting to the extent of one carload of bottles used for experimental purposes (R. 582).

The Bevo cases and bottles which were reserved for use at the end of 1924 and at the end of 1925 (exclusive of those which were the subject matters of the write-offs at the end of each of those years) were adequate to accommodate the volume of trade in all products marketed in Bevo bottles (R. 582).

The District Court found from the facts that the cases and bottles were discarded and abandoned at the times when they were written off (R. 582).

The total amount realized from sales of cases and bottles included in the write-offs was $142,123.55, compared with junk values in the aggregate amount of $221,505.35 deducted from their costs at the times of the write-offs (R. 582). The Bevo cases and bottles were not readily salable, because they were specially made and of a size and shape not generally used, and were not marketable excepting in small quantities and at sacrifice prices (R. 583).

The facts touching upon the secondary issues affecting the application of loss carry-overs and computations of overpayments, as found by the District Court, may be summarized as follows:

The charter of Anheuser-Busch, Incorporated (1875), being about to expire on July 7, 1925, the stockholders thereof formed a new corporation, Anheuser-Busch, Incorporated (1925), to which they transferred all of the shares of stock of Anheuser-Busch, Incorporated (1875), and from which they received in exchange therefor shares in Anheuser-Busch, Incorporated (1925), which represented in

the case of each stockholder the same pro rata interest[6] in the new corporation which he or she held in the old corporation (R. 576).

Thereafter, and as of the close of business on June 30, 1925, Anheuser-Busch, Incorporated (1875), whose sole stockholder was then Anheuser-Busch, Incorporated (1925), transferred all of its assets to Anheuser-Busch, Incorporated (1925), by way of a liquidating dividend, and as part of that transaction Anheuser-Busch, Incorporated (1925), assumed all of the liabilities of Anheuser-Busch, Incorporated (1875) (R. 576-7).

Anheuser-Busch, Incorporated (1925), at the commencement of business on July 1, 1925, had the same assets, the same liabilities and the same invested capital as Anheuser-Busch, Incorporated (1875), had had at the close of its business on June 30, 1925, and from and after July 1, 1925, Anheuser-Busch, Incorporated (1925), continued the business of Anheuser-Busch, Incorporated (1875), with the same officers and directors, at the same location and with the same facilities (R. 577).

The purpose of the formation by said stockholders of said 1925 corporation was to continue the business of the old corporation, and such formation was necessitated by the fact that the charter of the old corporation was about to expire and the laws of Missouri did not permit the extension of such charter for a further period of time, although such laws did, by permitting the stockholders of an expiring corporation to organize a new corporation of the same name to continue the business of the old corporation, point the way for reincorporation (R. 577).

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6 The actual numbers of shares transferred were not identical with the numbers of shares received, the old corporation's capital stock having been divided into 480 shares and the new corporation's into 180,000 (R. 612).

The District Court found from the facts that the effect of the reincorporation was the same as if the charter of the old corporation had been extended and that the two corporations were identical in fact and were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924 (R. 577).

The History of the Controversy.

On the consolidated income tax return of Anheuser-Busch, Incorporated, and affiliates for the year 1924, a net loss of $816,105.95 was reported for the affiliated group after deduction of the obsolescence loss of $1,381,451.31. Although the consolidated income tax returns for 1925 and 1926 reported net incomes for each year, no tax liability was shown in either return for the reason that operating losses of prior years were claimed as deductions in amounts sufficient to offset the incomes reported (R. 612-III).

In deficiency letters dated October 15, 1930, the Commissioner of Internal Revenue disallowed the deductions on account of obsolescence or loss of useful value, and, pursuant to such deficiency letters, there were assessed taxes for 1924, 1925 and 1926 which, together with interest, aggregated $186,277.18, divided into fifteen tax bills representing apportionments of such taxes for the different years to and among Anheuser-Busch, Incorporated, and the various other affiliated corporations (R. 574, 575, 597).

On January 22, 1931, Anheuser-Busch, Incorporated, paid all of these tax bills (R. 575).

On January 19, 1933, claims for refund were filed by or on behalf of the various affiliated corporations, which were found by the District Court to set forth grounds fully supporting its judgments (R. 575, 576). On April 19, 1934, the claims for refund were disallowed (R. 576).

On April 17, 1936, suits to recover overpayments of income taxes assessed and collected as above stated were filed, such suits corresponding respectively to the several tax bills rendered by the Collector pursuant to the deficiency letters of October 15, 1930 (R. 576).

On June 13, 14 and 15, 1939, the cases were tried by the District Court without a jury, jury being waived (R. 573).

On March 7, 1940, the District Court entered its Findings of Facts, Conclusions of Law, and Directions for Judgments (R. 573-593). It held that Anheuser-Busch, Incorporated, was entitled, both under subsection (a) (7) of Section 234 of the Revenue Act of 1924 and under subsection (a) (4) of Section 234 of the Revenue Act of 1924, to the deductions of $1,381,451.31 in 1924 and $98,586.16 in 1925, on account of obsolescence or loss of useful value of Bevo cases and bottles. The judgments were computed upon the theory that the net loss resulting from the allowance in 1924 might be offset against the income of Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), for the year 1925, and against the income of Anheuser-Busch, Incorporated (1925), for the year 1926, but not against the incomes of their subsidiaries in 1925 and 1926. Judgments were accordingly rendered in favor of taxpayers for the aggregate amount of $123,179.46 (R. 587, 590-92).

From such judgments the Collector appealed. Cross appeals were taken by the petitioners so as to protect their rights to judgments in the amount of $145,802.65 in the event that it should be determined that the District Court erred in treating Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), as the same taxpayer for the purpose of loss carry-overs, claiming that upon the theory that the two corporations were separate taxpayers, petitioners were entitled to the recovery of the larger aggregate amount (R. 18-19).

OPINIONS AND RULINGS BELOW.

The United States District Court for the Eastern Division of the Eastern Judicial District of Missouri did not render an opinion, but entered on March 7, 1940, its Findings of Facts, Conclusions of Law and Directions for Judgments (R. 573-593), and on April 2, 1940, its Amended and Additional Findings of Fact (R. 611-619). It held that petitioners were entitled, under subsections (a) (7) and (a) (4) of Section 234 of the Revenue Act of 1924 to deductions in the amount of $1,381,451.31 for 1924 and in the amount of $98,586.16 for 1925 on account of obsolescence or loss of useful value of Bevo cases and bottles, and rendered judgments for the recovery of $123,179.46 overpayments of income taxes for 1924, 1925 and 1926, computed upon the theory that Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 1128-1161) rendered on May 29, 1941, is reported as *Becker, Collector of Internal Revenue, v. Anheuser-Busch, Inc.*, 120 F. (2d) 403. It held that petitioners were not entitled to the deductions either under subsection (a) 7, on account of obsolescence, or under subsection (a) 4, on account of loss of useful value of the equipment, and ordered that the judgments of the District Court in favor of the plaintiffs be reversed with directions to dismiss the petitions, and that the judgments of the District Court against the plaintiffs be affirmed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals, in holding that deductions in the taxable years for obsolescence of the Bevo cases and bottles in controversy were not authorized by Section 234 (a) (7) of the Revenue Act of 1924, so far disregarded the facts of record in this case as to require exercise of this Court's power of supervision, in that it failed completely in its opinion to consider or advert to the essential facts determined by the District Court concerning the efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923, to utilize the Bevo cases and bottles in controversy through the marketing of new products then being developed, and overlooked the argument of petitioners that the accrual of obsolescence was thereby retarded until the advent of the taxable years, when such new products became demonstrated failures.

II.

The Circuit Court of Appeals, in holding that the loss of usefulness of the equipment here in controversy was not functional and did not arise from external causes (and was therefore not within the definition of obsolescence set forth in *Real Estate Land Title and Trust Company v. United States*, 309 U. S. 13), has so far disregarded the facts of record in this case as to require exercise of this court's power of supervision, in that under the undisputed facts of record in the case as found by the District Court the loss of usefulness of the equipment was caused by the introduction of de-alcoholized near-beer under changed governmental regulations—a wholly external cause not within the control of the taxpayers.

III.

The Circuit Court of Appeals, in holding that Section 234 (a) (7) of the Revenue Act of 1924 authorized only annual deductions, similar to depreciation deductions, over a period of years measuring the useful life of an asset, rendered a decision in conflict with decisions of this court in:

United States Cartridge Company v. United States, 284 U. S. 511;
Gambrinus Brewery Co. v. Anderson, 282 U. S. 638;
Burnet v. National Industrial Alcohol Company, Inc., 282 U. S. 646;
Burnet v. Niagara Falls Brewing Company, 282 U. S. 648.

IV.

The Circuit Court of Appeals, in considering abandonment or discarding of an asset as a prerequisite to an obsolescence deduction, rendered a decision in conflict with decisions of this court in:

United States Cartridge Company v. United States, 284 U. S. 511;
Gambrinus Brewery Co. v. Anderson, 282 U. S. 638;
Burnet v. National Industrial Alcohol Company, Inc., 282 U. S. 646;
Burnet v. Niagara Falls Brewing Company, 282 U. S. 648.

V.

The Circuit Court of Appeals, in holding that deductions in the taxable years for loss of useful value of the Bevo cases and bottles in controversy were not authorized by Section 234 (a) (4) of the Revenue Act of 1924, because usefulness of the equipment had terminated long before the tax years and there was no sudden termination of usefulness in the tax years, so far disregarded the facts of record in this case as to require exercise of this court's

power of supervision, in that under the undisputed facts of record in this case, as determined by the District Court, the equipment was being held in prior years for the marketing of new products then being developed, and termination of usefulness was perforce postponed until such products were demonstrated failures.

VI.

The Circuit Court of Appeals, in holding that abandonment or discarding of an asset [within the meaning of the regulations under Section 234 (a) (4) of the Revenue Act of 1924 relating to loss of useful value] implied relinquishment of ownership and possession through sale or destruction, rendered a decision in conflict with the decisions of other Circuit Courts of Appeal in:

Wheeling Tile Company v. Commissioner, 25 F. (2d) 455;
Liberty Baking Company v. Heiner, 37 F. (2d) 703;
United States v. Hardy, 74 F. (2d) 841;

and probably in conflict with the decision of this court in:

United States v. S. S. White Dental Manufacturing Company, 274 U. S. 398, 402.

PRAYER.

For the purpose of correcting the errors complained of and to the end that the rights of petitioners may be determined in accordance with the law, your petitioners respectfully pray: that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding it to certify and send to this court on a day certain to be therein designated a full and complete transcript of the records and proceedings of said Circuit Court of Appeals in the above-described causes (being docket numbers 11,-

816 to 11,836, both inclusive, on the docket of said court), to the end that the decision and judgment of said Circuit Court of Appeals in said causes may be reviewed by this Honorable Court as provided by law; that said decision and judgment be so reviewed by this court, and that your petitioners may have such other and further relief as to this court may seem appropriate.

ANHEUSER-BUSCH, INCORPORATED,

WILLIAM L. PARKER, Receiver of and for Anheuser-Busch Ice and Cold Storage Company, Incorporated, a corporation formerly existing under the laws of the State of Virginia,

MELROSE ICE CREAM CORPORATION, a corporation formerly existing under the laws of the State of New York,

ADOLPHUS BUSCH III, CHARLES D. RUSSELL, GUS G. KINDERVATER, and WILLIAM J. LANDES, Surviving Members of the Last Board of Directors, and Trustees for the Creditors and Stockholders, of said Melrose Ice Cream Corporation,

C. D. RUSSELL, Liquidator of Anheuser-Busch Ice Cream and Beverage Company, a corporation formerly existing under the laws of the State of Louisiana,

ADOLPHUS BUSCH III, C. D. RUSSELL and GEORGE A. H. MILLS, Surviving Members of the Last Board of Directors, and Statutory Trustees for the Creditors and Stockholders of New State Ice Company, a corporation formerly existing under the Laws of the State of Oklahoma, and

SPRINGFIELD ICE AND REFRIGERATING COMPANY,

By

DANIEL N. KIRBY,
HARRY W. KROEGER,
Attorneys for Petitioners.

SUPPORTING BRIEF.

OPINIONS BELOW.

The District Court did not render an opinion, but entered its Findings of Facts, Conclusions of Law and Directions for Judgments (R. 573-593), and its Amended and Additional Findings of Fact (R. 611-619).

The opinion of the Circuit Court of Appeals (R. 1128-1161) is reported as *Becker, Collector of Internal Revenue, v. Anheuser-Busch, Inc.*, 120 F. (2d) 403.

JURISDICTION OF THIS COURT.

The judgment of the Circuit Court of Appeals was entered on May 29, 1941 (R. 1161). A petition for rehearing (R. 1169), filed on June 13, 1841, was entertained by said court and denied on June 23, 1941 (R. 1183). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347).

STATEMENT.

A full statement of the case has been made in the foregoing petition for writ of certiorari, to which reference is hereby made.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding that under the facts and circumstances of this case deductions in the taxable years for obsolescence of the Bevo cases and bottles in controversy, were not authorized by Section 234 (a) 7 of the Revenue Act of 1924.

2. The Circuit Court of Appeals erred in disregarding and in failing to consider and give effect to the essential facts of record in the case, as determined by the District

Court, concerning the efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923, to utilize the Bevo cases and bottles in controversy through the marketing of new products then being developed, by reason of which the accrual of obsolescence was retarded until the advent of the taxable years, when such new products became demonstrated failures, and the equipment retained, until such time, the character of equipment usable in the business.

3. The Circuit Court of Appeals erred in holding that the loss of usefulness of the equipment here in controversy was not functional and did not arise from external causes.

4. The Circuit Court of Appeals erred in disregarding and in failing to consider and give effect to the facts of record in this case, as determined by the District Court, showing that the primary cause of the loss of usefulness of the equipment was the introduction of de-alcoholized near-beer under changed governmental regulations—a wholly external cause not within the control of the taxpayers.

5. The Circuit Court of Appeals erred in holding that Section 234 (a) 7 of the Revenue Act of 1924, authorized only annual deductions, similar to depreciation deductions, over a period of years measuring the useful life of an asset.

6. The Circuit Court of Appeals erred in considering abandonment or discarding of an asset as a prerequisite to an obsolescence deduction.

7. The Circuit Court of Appeals erred in holding that under the facts and circumstances of this case deductions in the taxable years for loss of useful value of the Bevo cases and bottles in controversy were not authorized by Section 234 (a) 4 of the Revenue Act of 1924.

8. The Circuit Court of Appeals erred in disregarding and in failing to consider and give effect to the facts of record in this case, as determined by the District Court, that

the equipment in controversy was being held in prior years for the marketing of new products then being developed, by reason of which the termination of its usefulness was postponed until the taxable years when such products were demonstrated failures.

9. The Circuit Court of Appeals erred in holding that abandonment or discarding of an asset [within the meaning of the regulations under Section 234 (a) 4 of the Revenue Act of 1924, relating to loss of useful value] implied relinquishment of ownership and possession through sale or destruction, and in failing to hold that under the facts and circumstances of this case the equipment in controversy was abandoned when charged off in the taxable years.

10. The Circuit Court of Appeals erred in failing to hold that petitioners were entitled to deductions on account of obsolescence or loss of useful value of the Bevo cases and bottles in controversy, as determined by the District Court.

11. The Circuit Court of Appeals erred in failing to hold that petitioners were entitled to judgments for overpayments of income taxes for the years 1924, 1925 and 1926 in the aggregate amount of $123,179.46, in accordance with the computations adopted by the District Court and in the respective amounts for which the District Court entered judgments.

12. The Circuit Court of Appeals erred in failing to hold that if the District Court erred in holding that Anheuser-Busch, Incorporated (1875), and Anheuser-Busch, Incorporated (1925), were the same taxpayer within the meaning of Section 206 (b) of the Revenue Act of 1924, petitioners were entitled to enhanced judgments in the aggregate amount of $145,802.65, computed upon the theory that said two corporations were separate taxpayers.

ARGUMENT.

Point I.

The Circuit Court of Appeals, in Holding That Petitioners Were Not Entitled to Deductions for Obsolescence Under Section 234 (a) (7) of the Revenue Act of 1924, Completely Failed in Its Opinion to Consider or Advert to the Essential Facts, as Determined by the District Court Concerning the Efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923 to Utilize the Bevo Cases and Bottles in Controversy Through the Marketing of New Products Then Being Developed.

In 1919, the brewing industry underwent drastic changes. Bevo, developed at a time when governmental regulations necessitated the production of nonalcoholic cereal beverages by an "arrested fermentation" process and their marketing in containers radically different from beer bottles (R. 577-578), was driven from the market by the production and sale in large quantities of the more palatable near-beer manufactured by the "de-alcoholizing" process and marketed in beer bottles, under changed regulations so permitting (R. 578). Consequently, from 1918 to 1919 the annual sales of Bevo dropped from 10,449,152 dozen bottles to 3,904,316 dozen bottles. By 1921 the sales were reduced to 794,378 dozen bottles (R. 620).

At approximately the same time that Bevo suffered its decline, production and sale of alcoholic beer ceased as a result of National Prohibition.

These facts, pertinent to ascertainment of the *cause* of the obsolescence or loss of useful value of the Bevo cases and bottles in controversy, will be further considered under Point II. The allocation of the *resultant loss* to the tax years was justified by the further record facts,

now to be referred to, which were not considered by the Circuit Court of Appeals.

As a result of the changes referred to, Anheuser-Busch, Incorporated, deprived of its principal product, was confronted with the alternatives of going out of business or of finding new means to utilize its plant, and to utilize, incidentally, the 749,897 Bevo cases and 3,680,231 dozen Bevo bottles here in controversy which had, by the end of 1921, accumulated in storage as a result of returns of equipment by the trade in excess of shipments to the trade (R. 579).

It chose the alternative of staying in business and undertook to utilize its case and bottle supplies through the introduction of new products, Ginger Ale, grape drinks and chocolate drinks (R. 579). Its expenditure of the funds required for the development of those products itself attests the good faith of the management in believing that the products would be successful and that such success would result in the utilization of the equipment. Had it succeeded in this in a measure commensurate with its success with Bevo, or in a measure commensurate with the success of other companies with similar products (e. g. Ginger Ale), there would have been no loss on this equipment.

The theory upon which the petitioners presented this case was that the equipment could not have been written off as useless at a time when the company, with reasonable expectation of success, planned to use it in the marketing of the new products; that the company was entitled to a reasonable opportunity to ascertain whether in fact the equipment had or did not have further usefulness before it was required to consider charging it off on account of obsolescence or loss of useful value; that allocation of the losses to the years when the Bevo cases and bottles had

accumulated would amount to penalizing the company for its courage in attempting to find profitable use for the property, and for the error of its belief that it could find such use; and that the years to which the losses were properly allocable were those in which the efforts to avert loss became demonstrable failures.

The Circuit Court of Appeals treated this case as if the facts touching upon the efforts of the company to stay alive and to utilize the equipment were not in the case. By treating the case as if it presented a state of facts, under which, subsequent to the drastic supersession of Bevo, the company had done nothing which affected the status of the Bevo case and bottle equipment, the Circuit Court of Appeals enabled itself to reach a conclusion with respect to the equipment that its "usefulness had terminated long before" the tax years (R. 1160, 1152).

It also enabled itself thereby to reach the conclusion (R. 1152; 120 F. [2d] 414) that the property was not used in the trade or business in the taxable year. Although neither the statute nor the regulation relating to obsolescence make any requirement of use during the taxable year, the continued reservation of the property for probable use for the new products until the taxable years, spells all that can possibly be required.

A day in court has not been granted without the consideration of the case as presented by the petitioners.

What petitioners sought in the courts was a determination whether, **under the facts and upon the figures presented,** reasonable business men would have concluded in 1924, and in 1925, that the efforts of the company to avert loss had failed, and that the cases and bottles in controversy could never be used again, and could not be sold excepting as junk.

The conclusion of the District Court as to the reasonableness of the write-offs was based upon facts and figures showing that in 1924, after three years experience in the marketing of the new products, the total volume of sales of all products moving in Bevo bottles did not exceed one-eighth of the peak volume of Bevo sales in 1918 (R. 580).

That conclusion was presented to the Circuit Court of Appeals for review, but was not reviewed.

Point II.

The Circuit Court of Appeals Disregarded the Facts of Record in This Case Relative to the Cause of the Loss of Usefulness of the Equipment.

The District Court in its findings of facts clearly defined the chain of events which led to the accumulation in storage of the equipment here in controversy. Bevo was manufactured by the "arrested fermentation process" in conformity with regulations in force at the time of its development (R. 575-576). Changed governmental regulations permitted the introduction of nonalcoholic cereal beverages manufactured by the "de-alcoholizing process" (R. 578-24). The introduction and competition of such new products, because of their greater palatability, caused a drastic decline in sales of Bevo (R. 578-23, 24). Such decline in sales implied an excess of returns from the trade of Bevo cases and bottles over shipments to the trade and caused the accumulation of equipment in storage (R. 579-28). By the end of 1921 the decline was recognized as permanent (R. 616-IX).

That the supersession of Bevo was the operating *cause* of the loss is clear. The fact that in the years 1920 to 1923 the accumulated equipment was held for use in the marketing of other beverages then being developed (R. 579-29) merely postponed the *effect*, i. e., retarded the

accrual of the obsolescence, until failure of those other products became demonstrable. At that time the equipment was neither usable nor salable (R. 580-34, 582-51, 583-52).

The Circuit Court of Appeals in holding [R. 1156; 120 F. (2d), at 416] that the losses here in question were not of a functional nature and did not arise from external causes so as to fall within the definition of obsolescence as contained in *Real Estate Land Title and Trust Company v. United States*, 309 U. S. 13, reached a conclusion which was not only contrary to the findings of the District Court, but was wholly unsupported by any evidence in the case.

In the *Real Estate Land Title and Trust Company* case this court had before it a situation involving no change in economic conditions, but merely a voluntary consolidation of title companies, which created a duplication of title plants.

In the instant case Anheuser-Busch, Incorporated, was the victim of drastic changes in the industry in which it was engaged. The supersession of its product, Bevo, was in no sense brought about by its own choice. The causes for that supersession were wholly external to it, and they resulted in a functional uselessness of the property.

Point III.

The Circuit Court of Appeals in Holding That Section 234 (a) (7) of the Revenue Act of 1924 Authorized Only Annual Deductions, Similar to Depreciation Deductions, Over a Period of Years Measuring the Useful Life of an Asset, Rendered a Decision in Conflict With the Decisions of This Court.

The Circuit Court of Appeals treated Section 234 (a) (7) as authorizing deductions for obsolescence only where, on

the basis of an estimate of normal useful life, the allowances could be spread over the period of that life (R. 1148, 1152; 120 F. [2d] at 412, 414)—although the Treasury Department has for years recognized that "obsolescence" does not have such limited meaning. In Bureau Bulletin "F," January, 1931 (C. C. H. Federal Tax Service 1941, p. 1791), it was said:

> "Two principal forms of obsolescence are generally recognized: The first, a sudden loss of useful value brought about by some radical change, and the second, a more gradual reduction of usefulness due to the accumulated effect of small improvements or changes introduced from time to time in the art or industry generally, no one of which improvements or changes in itself is sufficient to result in complete loss of usefulness of the particular property.
>
> "*Obsolescence of the first type rarely can be predicted prior to its occurrence.* However, this does not necessarily imply that the asset already must have been completely discarded or become useless, but merely that a point has been reached where it can be predicted with reasonable accuracy that its continued use beyond a certain future date, prior to the end of its normal useful life, will be impossible or unprofitable."

The decisions of this court have recognized that the accrual of obsolescence may frequently not be capable of anticipation, and that, where such is the case, the deductions are allowable when the loss becomes apparent.

In *United States Cartridge Company v. United States*, 284 U. S. 511, an ammunition plant was held to have become obsolete at the moment when war ended. In *Gambrinus Brewery Company v. Anderson*, 282 U. S. 638, *Burnet v. National Industrial Alcohol Company, Inc.*, 282 U. S. 646, and *Burnet v. Niagara Falls Brewing Company*, 282 U. S. 648, this court held permissible the taking of obso-

lescence on brewery properties and alcohol plants over the comparatively short period from January 31, 1918, when it became known that Prohibition would become effective, to January 16, 1920, when Prohibition did become effective.

Obsolescence is not capable of admeasurement by the foot rule, time clock or comptometer. In the words of this court in the *Niagara Falls Brewing Company* case (282 U. S., at 655) "such weight of evidence as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money fairly may be deemed sufficient." In cases involving factors such as obsolescence and depletion, it has been said that it is better to act upon rough estimates than to ignore the fact that the phenomena had occurred. *United States v. Ludey*, 274 U. S. 295; *Helvering v. Taylor*, 293 U. S. 507.

By taking the narrow, and, we submit, erroneous, view of obsolescence as something capable of being anticipated and measured in terms of annual allowances, and by rejecting the concept of obsolescence as one which yields to the facts of the particular case, as in the cases above cited, the Circuit Court of Appeals announced a rule so strict as in effect to nullify the benefits of the statute. It required of the taxpayers the ability to foresee in prior years the far-reaching effects of changes in business conditions, and to take the losses before they were believed to have been incurred upon penalty of not thereafter being permitted to take them. The decision allocates losses in respect of the cases and bottles here in controversy to years prior to 1924, when men greatly experienced in the beverage business were investing good money in enterprises designed to utilize them.

The harshness of the decision goes even so far as to foreclose inquiry whether, under a consistent plan of annual allowances, portions of such allowances were not

allocable to the tax years. Wholly inconsistently the Circuit Court of Appeals ruled out the concept of accelerated obsolescence, and then held that obsolescence had been accelerated in prior years, so that the taxpayers were entitled to no allowances in the tax years.

Point IV.

The Circuit Court of Appeals in Considering Abandonment or Discarding of an Asset as a Prerequisite to an Obsolescence Deduction, Rendered a Decision in Conflict With Decisions of This Court.

Although neither Section 234 (a) (7) of the Revenue Act of 1924 nor the regulation thereunder (Regulations 65, Article 166) imposed any requirement that an asset be discarded before an obsolescence deduction may be taken in respect thereto, the Circuit Court of Appeals [R. 1150-1151; 120 F. (2d), at 413] discussed discarding as a matter bearing upon the obsolescence issue [as distinguished from the issue upon the claims of the petitioners under Section 234 (a) (4)].

In treating discarding as a prerequisite to obsolescence, the Circuit Court of Appeals decided this case upon a principle in conflict with the decisions of this court in *Gambrinus Brewery Company v. Anderson*, 282 U. S. 638; *Burnet v. National Industrial Alcohol Company, Inc.*, 282 U. S. 646; *Burnet v. Niagara Falls Brewing Company*, 282 U. S. 648, where obsolescence deductions were allowed although the taxpayers continued in the ownership of, and continued to make restricted use of, the properties written off. Similarly, in *United States Cartridge Company v. United States*, 284 U. S. 511, there was no cessation of the right of user. In each of these cases the deductions allowed were, as in the instant case, in the amount of the depreciated cost of the assets less estimated salvage value.

Point V.

The Circuit Court of Appeals in Holding That Petitioners Were Not Entitled to Deductions for Loss of Useful Value Under Section 234 (a) (4) of the Revenue Act of 1924 Disregarded the Facts of Record in This Case as Determined by the District Court Concerning the Efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923, to Utilize the Bevo Cases and Bottles in Controversy.

The claims for refund, upon which the instant suits were based, explicitly urged that the deductions were allowable because the equipment in controversy became obsolete and completely lost its useful value in the tax years, and specifically referred to both Section 234 (a) (7) relating to obsolescence, and Section 234 (a) (4) relating to loss of useful value (R. 302). The District Court held that the deductions were allowable under both subsections (R. 584). The Circuit Court of Appeals held that neither subsection authorized the deductions (R. 1158-1160).

In holding that usefulness of the equipment "had terminated long before" the tax years and deductions for loss of useful value in the tax years were not authorized by Section 234 (a) (4) (R. 1160; 120 F. [2d], at 417), the Circuit Court of Appeals completely disregarded the facts concerning the efforts of Anheuser-Busch, Incorporated, in 1921, 1922 and 1923 to develop new products and to utilize the equipment in the marketing of such new products, just as it disregarded such facts in relation to the claims of petitioners under Section 234 (a) (7). The contentions here are the same as those discussed under Point I, and, for sake of brevity, reargument is omitted at this point.

Point VI.

The Circuit Court of Appeals, in Holding That Abandonment or Discarding of an Asset (Within the Meaning of the Regulations Under Section 234 [a] [4] of the Revenue Act of 1924, Relating to Loss of Useful Value) Implied Relinquishment of Ownership and Possession Through Sale or Destruction, Rendered a Decision in Conflict With the Decisions of Other Circuit Courts of Appeals and Probably in Conflict With the Decisions of This Court.

The District Court found (R. 582-48) that the cases and bottles included in the write-off of 1924 were discarded and abandoned in 1924, and that the bottles which were included in the write-off of 1925 were discarded and abandoned in 1925. Such finding was in relation to the requirement of discarding contained in Article 143 of Regulations 65, relating to loss of useful value. The Circuit Court of Appeals treated such finding of the District Court as a mere conclusion and reached a contrary conclusion (R. 1150, 1159; 120 F. [2d], at 413, 417).

In rejecting the trial court's conclusion that the property in question was abandoned and discarded in the tax years, the Circuit Court of Appeals laid emphasis upon the undenied facts that "the employees were not given instructions to refrain from using the cases and bottles written off" and "there was nothing to prevent the use of the equipment at any time, *if use could be found for it.*"

While emphasizing the absence of injunction upon the employees not to use the equipment, the Court overlooked the finding of the District Court (R. 582-47) that the equipment was not accessible to the production facilities and could not be used excepting upon incurrence of expense in hauling, for which an executive order would be required.

The liberty of the company to use the equipment, *if use*

could be found for it, was indeed a hollow privilege. The company had no product to market through the use of the equipment.

The District Court's conclusion of discarding, based upon inaccessibility of the equipment (R. 582-47), *actual nonuser* after the write-offs in question (R. 582-49) and the adequacy of stocks reserved for use (R. 582-50), was overturned by the Circuit Court of Appeals on the basis of the company's retention of ownership and possession. Such basis implied that sale or destruction were prerequisites to abandonment, although Article 143 of Regulations 65 declared the rule therein expressed to be an "exception to the rule requiring a sale or other disposition of property in order to establish a loss."

Such a decision is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Wheeling Tile Co. v. Commissioner of Internal Revenue*, 25 F. (2d) 455, where a loss in respect of oil-burning equipment was allowed in the year when it failed to function satisfactorily, although it was not then disposed of; with the decision of the Circuit Court of Appeals for the Third Circuit in *Liberty Baking Co. v. Heiner*, 37 F. (2d) 703, where a loss was allowed for bread wrappers acquired for bread loaves of a size required by war regulations, although the wrappers were not destroyed; and with the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States v. Hardy*, 74 F. (2d) 841, where a loss of the value of an exclusive agency for the sale of "Bevo" was allowed upon temporary cessation of the business under war regulations, although the taxpayer then retained and later sold the agency.

It was said in *United States v. S. S. White Dental Manufacturing Co.*, 274 U. S. 398, at pages 402-3:

"A loss may become complete enough for deduc-

tion without the taxpayer's establishing that there is no possibility of an eventual recoupment. * * * The Taxing Act does not require the taxpayer to be an incorrigible optimist."

The foregoing facts, authorities and argument are respectfully submitted in support of petitioners' prayer that this Honorable Court grant a writ of certiorari in the instant case.

Respectfully submitted,

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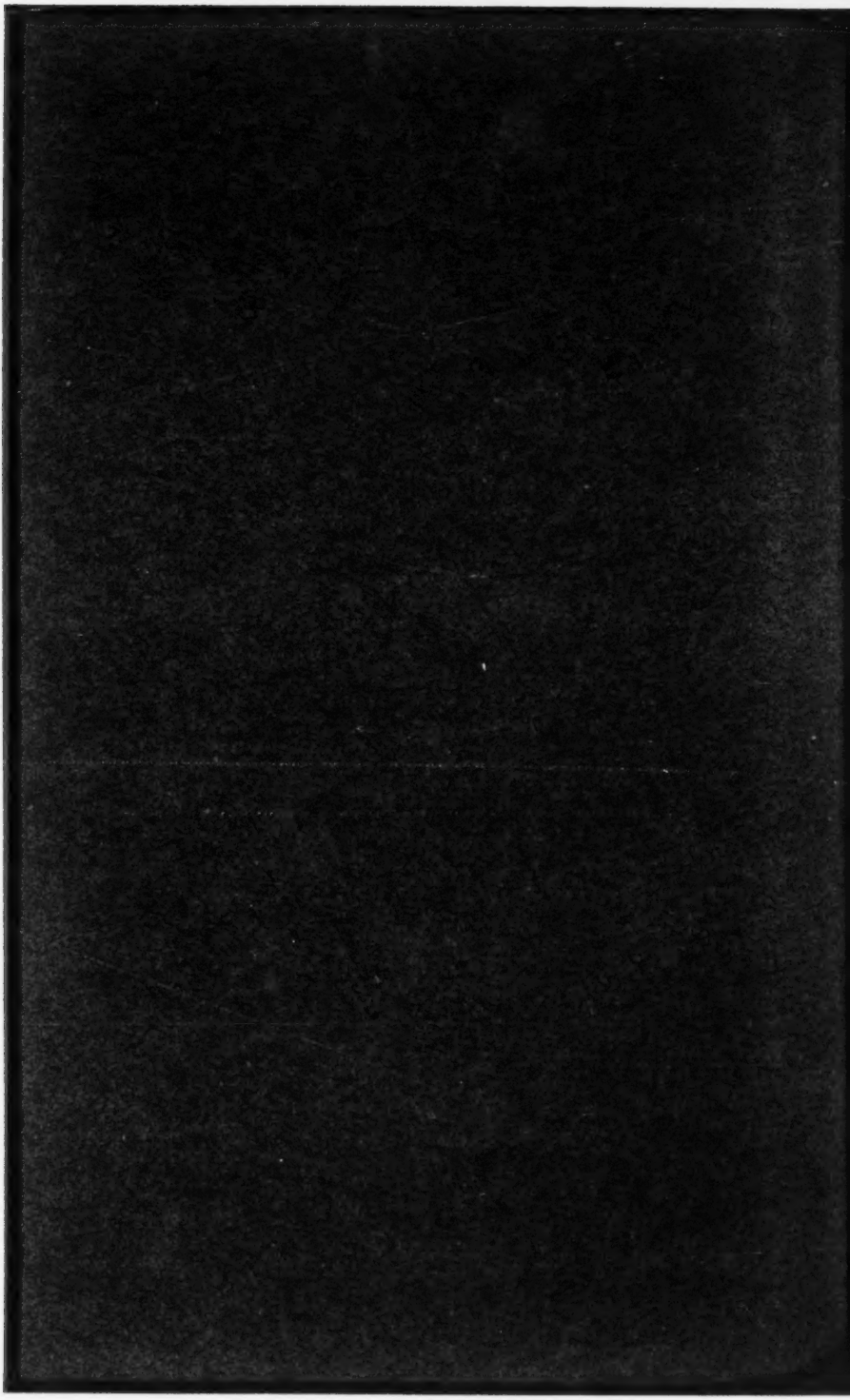

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 351

ANHEUSER-BUSCH, INCORPORATED, PETITIONER

v.

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST UNITED STATES COLLECTION DISTRICT OF MISSOURI, AND COMPANION CASES[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Eastern District of Missouri did not render an opinion but entered judgments upon the basis of its findings of fact and conclusions of law (R. 573–586). There-

[1] The style of the cases in the Circuit Court of Appeals is as follows:

No. 11816—*Becker, Collector*, v. *Anheuser-Busch, Inc.*
No. 11817—*Anheuser-Busch, Inc.*, v. *Becker, Collector.*
No. 11818—*Becker, Collector*, v. *Anheuser-Busch, Inc.*

after, upon motion of the Government (R. 600–611), additional findings of fact were entered (R. 611–619). The opinion of the Circuit Court of Appeals (R. 1128–1161) is reported in 120 F. (2d) 403.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 29, 1941 (R. 1161). Petition for rehearing was filed June 13, 1941 (R. 1169–1181), and denied June 23, 1941 (R. 1183). The petition for writ of certiorari was filed August 6, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

No. 11819—*Becker, Collector*, v. *William L. Parker, Receiver of and for Anheuser-Busch Ice and Cold Storage Co., Inc., etc., et al.*

No. 11820—*William L. Parker, Receiver of and for Anheuser-Busch Ice and Cold Storage Co., Inc., et al.*, v. *Becker, collector.*

No. 11821—*Becker, Collector*, v. *William P. Parker, Receiver of and for Anheuser-Busch Ice and Cold Storage Co., Inc., etc., et al.*

No. 11822—*William L. Parker, Receiver of and for Anheuser-Busch Ice and Cold Storage Co., Inc., etc., et al.*, v. *Becker, Collector.*

No. 11823—*Becker, Collector*, v. *Melrose Ice Cream Corporation, a corporation formerly existing under the laws of the State of New York, etc., et al.*

No. 11824—*Melrose Ice Cream Corporation, a corporation formerly existing under the laws of the State of New York, etc., et al.*, v. *Becker, Collector.*

No. 11825—*Becker, Collector*, v. *C. D. Russell, Liquidator of Anheuser-Busch Ice Cream and Beverage Co., etc., et al.*

QUESTIONS PRESENTED

As a result of a precipitate decline of nonalcoholic beverage sales in 1918 to 1920, from which the sales never recovered, Anheuser-Busch, Inc., accumulated a large supply of bottles and cases which it stored and of which it made only occasional use. It retained and actively used, however, a substantial quantity of such bottles and cases for its remaining business. In 1922 and 1923, and thereafter until 1932, the company attempted without substantial success to develop new beverages the production and sale of which would utilize the surplus bottles and cases. At the close of 1924, and

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No. 11826—*C. D. Russell, Liquidator of Anheuser-Busch Ice Cream and Beverage Co., etc., et al.*, v. *Becker, Collector.*

No. 11827—*Becker, Collector*, v. *C. D. Russell, Liquidator of Anheuser-Busch Ice Cream and Beverage Co., etc., et al.*

No. 11828—*C. D. Russell, Liquidator of Anheuser-Busch Ice Cream and Beverage Co., etc., et al.*, v. *Becker, Collector.*

No. 11829—*Becker, Collector*, v. *Adolphus Busch, III, et al., surviving members, etc., et al.*

No. 11830—*Adolphus Busch, III, et al., surviving members, etc., et al.*, v. *Becker, Collector.*

No. 11831—*Becker, Collector*, v. *Adolphus Busch, III, et al., surviving members, etc., et al.*

No. 11832—*Adolphus Busch, III, et al., surviving members, etc., et al.*, v. *Becker, Collector.*

No. 11833—*Becker, Collector*, v. *Springfield Ice and Refrigerating Co., etc., et al.*

No. 11834—*Springfield Ice and Refrigerating Co., etc., et al.*, v. *Becker, Collector.*

No. 11835—*Becker, Collector*, v. *Springfield Ice and Refrigerating Co., etc., et al.*

No. 11836—*Springfield Ice and Refrigerating Co., etc., et al.*, v. *Becker, Collector.*

again at the close of 1925, the depreciated cost of certain of the cases and bottles less their remaining junk value was charged off the books. The bottles and cases, however, were not removed or otherwise disposed of. The questions are:

1. Whether Anheuser-Busch, Inc., and its predecessor were entitled, under Section 234 (a) (7) of the Revenue Acts of 1924 and 1926 to deductions in 1924 and 1925 in excess of those allowed by the Commissioner on account of obsolescence of the cases and bottles.

2. Alternatively, whether Anheuser-Busch, Inc., and its predecessor were entitled under Section 234 (a) (4) of the Revenue Acts of 1924 and 1926 to additional deductions in 1924 and 1925 on account of losses alleged to have been sustained in respect of the cases and bottles.[2]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations will be found in the Appendix, *infra*, pp. 22–29.

STATEMENT

The complaints in the District Court alleged that the Commissioner of Internal Revenue erred in the disallowance of obsolescence deductions claimed in consolidated income tax returns for 1924 filed by

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[2] The Circuit Court of Appeals found it unnecessary to decide other questions since its conclusions on the two questions above disposed of the entire controversy.

Anheuser-Busch, Inc., a Missouri corporation organized in 1875, hereinafter referred to as Anheuser-Busch, Inc. (1875), and its affiliated subsidiaries, and filed for 1925 by its successor, Anheuser-Busch, Inc., a Missouri corporation organized in 1925, hereinafter referred to as Anheuser-Busch, Inc. (1925), and its affiliates (R. 29–44, 39).[3] The deductions in question amounted to $1,381,451.31 for 1924, and $98,586.16 in 1925 (R. 35–36). The facts out of which the controversy arose may be summarized as follows:

The chief business of Anheuser-Busch, Inc. (1875), prior to the advent of national prohibition was the manufacture and sale of beer (R. 577). Bevo, a non-alcoholic malt beverage, had been developed in 1908 (R. 577). It was manufactured on a large scale in 1916, and reached peak production in 1918, after which sales declined drastically (R. 578). The sales of Bevo from 1916 to 1925 follow (R. 454–455):

Year	*Sales*
1916	2,282,404 Doz. Bottles
1917	7,063,812 Doz. Bottles
1918	10,449,152 Doz. Bottles
1919	3,904,316 Doz. Bottles
1920	3,044,006 Doz. Bottles
1921	794,378 Doz. Bottles
1922	732,302 Doz. Bottles
1923	726,348 Doz. Bottles
1924	709,008 Doz. Bottles
1925	721,848 Doz. Bottles

[3] In the interest of conciseness, references herein are to District Court case No. 11802, and to the cross-appeals therein docketed in the Circuit Court as cases Nos. 11816 and 11817.

The immediate cause of the decline in sales of Bevo after 1918 was a change in governmental regulations affecting the production of near-beer (R. 578–579). The change in regulations, occurring August 15, 1916 (R. 418), made it possible to manufacture alcoholic beer and then de-alcoholize it to the required alcoholic content (R. 578). In 1919, Anheuser-Busch, Inc. (1875), introduced de-alcoholized Budweiser beer and marketed it in beer bottles (R. 578–579). De-alcoholized beer was superior to Bevo as a beverage (R. 578). A further factor in the decline of Bevo sales was the competition of home brew (R. 579).

In August 1918, the purchase of Bevo cases was discontinued (R. 616). As the result of the reduced demand, a large surplus of cases and bottles accumulated [4] and were stored partly in unused buildings where they were protected from the weather, partly in sheds roofed over without sides, and partly in open bins wholly unprotected from the weather (R. 616). In 1920, the company authorized the sale of 1,404,000 dozen of the bottles at 12½¢ per dozen (R. 616). In 1921, 877,753 of the cases were rebuilt for other uses at a cost of 46¢ per case (R. 616).

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[4] Sales of Bevo included sales of the liquid content only and deposits were taken for the return of the cases and bottles (R. 579). After the sales, therefore, the cases and bottles were returned (R. 579).

By the end of 1921, the company's officials recognized that the decline in the volume of Bevo sales in comparison with sales of preceding years was permanent (R. 616). On December 18, 1923, the Directors priced 100,000 cases with the usual complement of empty bottles at $1 per case, but this price could not be obtained (R. 616). Upon representations of the plant superintendent that the equipment was depreciating rapidly, in April 1924, the sale of the same quantity of cases and bottles was authorized at 35¢ for each unit of one case and two dozen bottles (R. 616–617).

Meanwhile, following the permanent decline in Bevo sales, the company attempted to develop new products and beverages (R. 617). In 1922 and 1923 it developed and placed on the market several beverages, hoping to make use of the surplus Bevo cases and bottles (R. 617). In 1926 a malt tonic was placed on the market in the Bevo bottles, and as late as 1932, another product was marketed in them (R. 617, 620).

It was the practice of Anheuser-Busch, Inc. (1875), and of its successor to take physical inventories of all the company's supplies and equipment on hand in each department at the close of each calendar year (R. 614). The inventories show that the cases and bottles had accumulated in large quantities prior to December 31, 1920, increas-

ing in number until December 31, 1921, after which the quantities remained approximately the same from 1922 to 1926, inclusive (R. 614). The inventory figures were not entered in the books of account (R. 616).

The Bevo cases and bottles were not segregated upon the books of account as a separate asset, but they were carried in the same account with all other types of cases and bottles (R. 619). At the end of 1924 and 1925 the cases and bottles in controversy were charged off the books (R. 580, 581). No general instructions were given to the employees of the company to refrain from using the cases and bottles, which in fact could have been used at any time had there been an increased demand for any product which was being bottled and sold in them (R. 619). The cases and bottles were neither removed from the various locations where they had been stored, nor were they destroyed, sold, or disposed of during 1924 and 1925 (R. 617). Anheuser-Busch, Inc. (1925), continued in ownership and possession of the surplus cases and bottles until they were ultimately sold, discarded, destroyed by fire, or otherwise disposed of (R. 617).

Petitioner did not show the depreciation and obsolescence sustained during previous years, the amounts charged off, or the amounts allowed by the Commissioner upon the particular cases and bottles in controversy (R. 618). It was shown that on the

10-ounce cases and bottles as a whole, the company charged off no depreciation for 1916 or 1917 (R. 618). For 1918, 1919, and the first seven months of 1920, depreciation was written off on the basis of shipments at the rate of 3.4¢ per case and 1¢ per dozen bottles shipped (R. 618). For the last five months of 1920, and for the years 1921 to 1924, inclusive, the depreciation written off amounted to 5¢ per case and 2¢ per dozen bottles shipped (R. 618). The depreciation deductions claimed in the income tax returns for the various years were not classified in respect of the different kinds of cases and bottles, and, accordingly, the returns did not disclose how much depreciation applied to 10-ounce Bevo cases and bottles and how much applied to other equipment in the case and bottle account (R. 619).

Petitioners urged, and the trial court concluded, that the deductions constituted obsolescence deductible under Section 234 (a) (7) of the Revenue Act of 1924 (R. 37–39, 584). Petitioners urged further, and the trial court held, that the deductions also constituted losses sustained during the respective years, deductible under Section 234 (a) (4) of the Act (R. 38–39, 584–585). Upon review, the circuit court of appeals held that the allowance of the deductions either as obsolescence or as losses sustained during the respective years was not justified (R. 1129–1161).

The position of the Commissioner is set forth in a letter dated March 23, 1936, relative to peti-

tioners' claims for refund which he had rejected (R. 382–383):

> You contend that a further deduction should be allowed this taxpayer for the years 1924 and 1925 as loss of useful value on 10-ounce Bevo cases and bottles which were set aside by the corporation in the years in question, due to the fact that bottles and cases on hand exceeded the requirements of the declining trade.
>
> In rejecting the claims, the Bureau took the position that until the investment in cases and bottles was converted into terms of money by sale or other final disposition, there was neither loss nor gain and the income of the company for the year was neither increased nor decreased.
>
> In order to be allowed as a deduction for loss of useful value, a taxpayer must prove that there has been a loss and that it was sustained during the taxable year. While it is stated that certain cases and bottles were set aside and loss on abandonment claimed, it is conceded that these bottles and cases were not finally disposed of and were available for use thereafter had the necessity arisen. These types of bottles and cases were in use by the company for Bevo and other products through the year 1933. Under the circumstances it is held that no deductible loss was sustained in the years 1924 and 1925.

Although the Commissioner denied the deductions here in dispute in respect of these particular

cases and bottles, he did allow substantial deductions from income in 1924 and 1925 for depreciation and losses sustained upon the case and bottle account as a whole (R. 619).[5]

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[5] For 1924, the Commissioner allowed deductions aggregating $119,907.30 for 12-ounce cases damaged beyond repair and abandoned, and for 7-ounce bottles and cases abandoned and discarded (R. 253). The Commissioner also allowed the depreciation claimed in the return in the sum of $249,634.52 (R. 133). In fact, the Commissioner not only allowed the depreciation claimed, but also increased the allowance by $50,897.17, to provide for depreciation accruing at 16⅔ percent per year upon certain cases either discarded or damaged beyond repair and charged off the following year (R. 251, 253, 258, 259). The petitioners also obtained the benefit of a deduction for case and bottle expense amounting to $49,775.34 in addition to which repairs and maintenance were deducted as a separate item (R. 127). The total of the losses and depreciation thus allowed on cases and bottles for 1924, exclusive of other expenses, repairs and maintenance pertaining to them, aggregated $420,438.99.

For 1925, the Commissioner allowed losses amounting to $335,379.17 for 12-ounce and 10-ounce cases destroyed or damaged beyond repair and for defective 12-ounce bottles sold (R. 259). The deductions claimed for losses on cases and bottles amounted to $596,656.85 (R. 259). Of the amount disallowed, $261,277.68, the greater part represented additional depreciation allocated to 1922, 1923, and 1924 (R. 259). In addition to the deductions for losses, the Commissioner also allowed depreciation in the sum of $241,624.47 (R. 153, 258). Thus the depreciation and losses allowed for 1925 on the case and bottle account as a whole aggregated $577,033.64, exclusive of case and bottle expense deducted amounting to $122,842.58, and also exclusive of repairs and maintenance (R. 153).

ARGUMENT

The court below, reversing the district court,[6] held that neither under Section 234 (a) (7) of the Revenue Acts of 1924 and 1926, nor under Section 234 (a) (4), was the petitioner or its predecessor[7] entitled to the deductions claimed, representing the purported depreciated cost (less salvage) of cases and bottles stored as surplus supplies which was written off in 1924 and 1925.

We submit that the court below correctly held that the existence of the conditions affecting the petitioner's sales did not establish its right to deductions for 1924 and 1925 under either Section 234 (a) (7) or 234 (a) (4).[8] The two sections are mutually exclusive, *Real Estate Title Co.* v. *United States,* 309 U. S. 13, and for that reason the court's denial of the deductions under the two sections rested on somewhat different grounds.

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[6] Certain of the judgments entered by the district court against the Collector provided for recovery of taxes paid for 1926, since it concluded that net losses sustained by Anheuser-Busch, Inc. (1875) for 1923 and 1924 were allowable as deductions from income of Anheuser-Busch, Inc. (1925), for 1925 and 1926 (R. 585, 595).

[7] The petitioner claimed the deduction for 1925 and its predecessor for 1924. For convenience, both will be referred to herein as the petitioner.

[8] In holding that petitioners did not qualify for deductions under Section 234 (a) (7) the court below recognized that there had been a decline in volume of sales of the petitioner's product, Bevo, and that the decline was attributable to the Government's regulation issued in 1916 (R. 1151). Contrary to the petitioner's assertion (Pet. 22, 33–34), however, the

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Section 234 (a) (7) provides that the taxpayer may deduct a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. Article 161, of Regulations 65 and 69, dealing with depreciation generally, provides that the annual allowance for depreciation shall be the

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court did not hold that the changed regulation and resulting competition was not such a cause as would permit of a deduction for obsolescence under Section 234 (a) (7). Rather the court held that there was no such change of conditions affecting the bottles and cases with respect to which obsolescence was claimed as warranted the taxpayer's charging off in 1924 and 1925, respectively, roughly five-sixths of their cost as deductions for obsolescence (R. 1151–1152). The petitioner argues (Pet. 22, 34) that the court erroneously asserted that the loss of usefulness of these supplies was not "functional" within the rules laid down by this Court in *Real Estate Title Co.* v. *United States*, 309 U. S. 13. But actually the court below stated only that neither in the instant case nor in the case of *Real Estate Title Co.* v. *United States*, *supra*, was there "* * * a functional depreciation of the property *in the tax year commensurate with the claimed deduction* * * *." (R. 1156). [Italics added]. A reading of the decision of the court below clearly establishes that the court properly addressed itself not to the question whether at some earlier or later time there was a functional depreciation, but only to the question before it, whether there was such depreciation, and to the extent claimed, for the years 1924 and 1925.

Nor did the court below, as the petitioners argue (Pet. 23), hold that abandonment of an asset is a prerequisite to the allowance of an obsolescence deduction. The absence of abandonment was clearly not the major point on which the decision below turned. Hence, there is no conflict in principle between this case and the cases which petitioner cites.

amount which should be set aside for the taxable year in accordance with a reasonably consistent plan whereby the aggregate amount so set aside plus salvage value will at the end of the useful life of the property in the business equal the statutory basis of the property. Cf. *United States* v. *Ludey,* 274 U. S. 295, 300–301. Article 166, Regulations 65 and 69, dealing with obsolescence, provides that where the taxpayer shows that property is being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, a reasonable deduction for obsolescence shall be allowed in addition to depreciation. These Regulations, the validity of which has not been challenged, require that the term of economic usefulness of property affected by obsolescence be established and we believe that the decisions of this Court in *Real Estate Title Co.* v. *United States, supra; Gambrinus Brewery Co.* v. *Anderson,* 282 U. S. 638; *Burnet* v. *National Industrial Alcohol Co.,* 282 U. S. 646; and *Burnet* v. *Niagara Falls Brewing Co.,* 282 U. S. 648, support this view.

Petitioner urges (Pet. 23) that the decision in this case is in conflict with the last three cases mentioned above and *U. S. Cartridge Co.* v. *United States,* 284 U. S. 511, because of the claimed holding of the court below that Section 234 (a) (7) authorizes only annual deductions similar to depreciation. The court below, however, did not rest its decision on the ground that obsolescence must be spread

over more than one year.[9] In substance, it held that the taxpayer had not established that the obsolescence of the cases and bottles in controversy was sustained in the years 1924 and 1925, respectively, and hence it held that the deductions claimed were not allowable.

This conclusion is plainly justified by the evidence in the record. The petitioner's Bevo sales had been affected by changes in the Government regulations issued in 1916 as the trial court found; the sales had declined precipitately in 1919–1921. Admittedly they fluctuated very little from 1921 to the end of 1925 (R. 454–455). This decline in trade resulted in an accumulation of more cases

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[9] In any event, a holding that obsolescence must be spread over more than one year for qualification under section 234 (a) (7) might well be correct, since obsolescence occurring wholly within one year might then more logically entitle a taxpayer to a deduction under Section 234 (a) (4) and Article 143 of Regulations 65 and 69. In *U. S. Cartridge Co.* v. *United States*, 284 U. S. 511, a deduction for obsolescence of certain buildings was allowable in 1918, because of the Armistice, though no period of obsolescence extending beyond a year had been established. When, as in the *U. S. Cartridge* case, a total loss of useful value occurs in one year, loss deduction, now an obsolescence deduction, should probably be allowed. Article 143, Regulations 65 and 69; 2 *Paul and Mertens*, Law of Federal Income Taxation (1934) Sec. 20.111. But this Court was not called upon to decide that question. The Government argued only that no obsolescence deduction should be allowed because by Section 234 (a) (8) of the Revenue Act of 1918, amortization of war production facilities was authorized. This Court held only that the amortization provision did not exclude an obsolescence allowance.

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and bottles than the petitioner could use in its business. The cases and bottles stored as surplus supplies, however, were of precisely the same character as other cases and bottles which the taxpayer was still using during the year 1924 and thereafter, both in the sale of Bevo and in the sale of other products. In 1926 a malt tonic was placed on the market in Bevo bottles and as late as 1932 another product was marketed in them (R. 617–620). Also, sales of surplus bottles (worth even as salvage 22 per cent of their average cost, according to the valuation assigned to them at the time by the taxpayer's officers) and of cases were being made in 1924 and thereafter (R. 616–617). In the final analysis the petitioner's claim to deductions for obsolescence in 1924 and 1925 rests solely on the fact that its officers decided in 1924 that a certain portion of the stored cases and bottles would not be used and that in 1925 they decided that an additional number would not be used.

The petitioner has been allowed losses on the sale of such cases and bottles as were sold or damaged beyond repair in 1924 and 1925 and previous years. It has also been allowed depreciation on those not sold or otherwise disposed of. It seeks in addition to claim a deduction for obsolescence in the amount of $1,381,451.31 for the year 1924 and of $98,586.16 for the year 1925. That the deductions claimed are unjustified in the light of the facts is plain when it is recalled that under the district court's decision

$74,987.70 was deemed a reasonable allowance for depreciation (including obsolescence) of the cases and bottles in controversy for the eight years 1916–1923, but that a deduction equalling roughly five-sixths of the cost was not excessive for one year, 1924. This obviously is not a spreading of depreciation, including obsolescence, over the useful life of the property pursuant to a reasonably consistent plan.

The petitioner's theory, however, is that the accrual of obsolescence was retarded during the years 1921–1923 while it was trying to develop other uses for the cases and bottles, that such products suddenly became demonstrated failures, and that the cases and bottles became useless and valueless in 1924 and 1925. But the record does not support the premises upon which this theory rests. On the contrary, until 1932 attempts to find uses for the cases and bottles continued. We submit that on the facts the only conclusion that can be reached is that the taxpayer has established no definite period of obsolescence and clearly has failed to prove that obsolescence occurred wholly in 1924 and in 1925 with respect to the portion of the bottles and cases written off in each respective year.[10]

---

[10] Petitioner further urges (Pet. 22, 30–33) that the court below improperly disregarded the findings of the district court in respect of the facts relating to the retarding theory. But the court below adverted (R. 1140, 1152) though generally and without emphasis, to these factors and also expressly included in its opinion (R. 1136) the lower court's

II

Similarly the decision of the court below on the second question is correct. Losses with respect to property are ordinarily allowable under Section 234 (a) (4) only when property is sold or otherwise disposed of. Article 143 of Regulations 65 and 69, Appendix, *infra*, however, provides for the allowance of a deduction for a loss of useful value and imposes certain conditions upon the allowance of this deduction: (1) The deduction is applicable to cases in which the loss of useful value is brought about through a change in business conditions; (2) the deduction is limited to cases in which the usefulness of capital assets is suddenly terminated; (3) the taxpayer must discontinue the business or discard the property permanently from use; (4) the loss must be claimed for the year in which the taxpayer discontinues the business or discards the property; and (5) any loss resulting from gradual processes for which depreciation deductions are

---

findings on this point. We submit, however, that the court was justified in its treatment of these findings because of their diminished significance in the light of further findings, including those relating to continued attempts to use the bottles. And in any event, the ultimate issue of obsolescence in one for the reviewing court to determine. Compare *Real Estate Title Co.* v. *United States*, 309 U. S. 13, where the taxpayer vigorously urged (petitioner's brief, pp. 33–38) a similar contention upon which this Court, in affirming the decision of the circuit court of appeals, did not expressly comment.

authorized may not be allowed as loss of useful value.

It is submitted that the petitioner fails to satisfy the above requirements in critical particulars. There was no substantial change in business conditions in 1924 or 1925; the change in business conditions which brought about the permanent decline in Bevo sales had occurred several years before 1924. Nor was there an abrupt termination of the usefulness of the property in either 1924 or 1925. Indeed, there had been a termination of the use of the cases and bottles in the years 1919 to 1921, but this simply serves to demonstrate the shortcomings in the evidence introduced to establish that the losses were sustained during the years in question.

The Regulations further limit deductions for loss of useful value to cases in which the business is discontinued or the assets permanently discarded. Here, the Bevo business was not discontinued nor were the assets discarded until many years later. Instead, the assets remained during 1924 and 1925 in the same locations where they had been stored in previous years.

The petitioner also urges that the holding of the court below that abandonment or discarding of an asset implied relinquishment of ownership and possession through sale or destruction is in conflict with the decisions of other circuit courts of appeals

(Pet. 24).[11] The short answer to that contention is that the court did not so rule. Of course, property having a salvage value might under certain conditions be abandoned and the property be discarded without a sale, destruction, or final disposition thereof. But the cases cited are not in conflict, for the evidence here showed neither abandonment nor discard of the property during the years 1924 and 1925.[12]

---

[11] The cases urged as in conflict are *Wheeling Tile Co.* v. *Commissioner*, 25 F. (2d) 455 (C. C. A. 4); *Liberty Baking Co.* v. *Heiner*, 37 F. (2d) 703 (C. C. A. 3); and *United States* v. *Hardy*, 74 F. (2d) 841 (C. C. A. 4). Petitioner also suggests that the holding is probably in conflict with the decision of this Court in *United States* v. *White Dental Co.*, 274 U. S. 398.

[12] The Collector's Statement of Points assigned numerous errors other than those noticed by the Court of Appeals (R. 6–15). It was pointed out that the amounts of the deductions allowed by the trial court were excessive due to errors in costs and in the adjustment of depreciation for prior years. It was pointed out further that under Section 202 (b) (2) of the Revenue Act of 1924, absence of proof concerning the amount of depreciation allowed by the Commissioner in previous years (R. 618) was fatal to the recovery of any refunds predicated upon the allowance of the deduction of $1,381,451.31 claimed for 1924. It was assigned as error that Anheuser-Busch, Inc. (1875), whose charter expired July 7, 1925, was held to be the same taxpayer as its successor. In the interests of brevity, we present no argument concerning these and other errors which the lower court found it unnecessary to consider. We believe, however, that the judgments in favor of the Collector may be sustained on grounds other than those assigned in the opinion.

CONCLUSION

The decision below is correct. It turns upon the peculiar facts of the case and does not present a question of general importance. There is no conflict of authority. The petition should be denied.

Respectfully submitted.

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SEPTEMBER 1941.

APPENDIX

Revenue Act of 1924, 43 Stat. 253:

DETERMINATION OF AMOUNT OF GAIN OR LOSS.

SEC. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

(b) In computing the amount of gain or loss under subdivision (a) proper adjustment shall be made for (1) any expenditure properly chargeable to capital account, and (2) any item of loss, exhaustion, wear and tear, obsolescence, amortization, or depletion, previously allowed with respect to such property.

* * * * *

BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdi-

vision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, * * *.

NET LOSSES.

SEC. 206. (a) As used in this section the term "net loss" means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations:

* * * * *

(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

(c) If for the taxable year 1922 a taxpayer sustained a net loss in excess of his net income for the taxable year 1923 (such net loss and net income being computed under the Revenue Act of 1921), the amount of such excess shall be allowed as a deduction in computing net income for the taxable year 1924 in accordance with the method provided in subdivisions (b) and (c) of this section.

(f) If for the taxable year 1923 a taxpayer sustained a net loss within the provisions of the Revenue Act of 1921, the amount of such net loss shall be allowed as a deduction in computing net income for the two succeeding taxable years to the same extent and in the same manner as a net loss sustained for one taxable year is, under this Act, allowed as a deduction for the two succeeding taxable years.

* * * * *

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise. * * *

The basis for determining the amount of the deduction for losses sustained shall be the same as is provided in section 204 for determining the gain or loss from the sale or other disposition of property;

* * * * *

(7) A reasonable allowance for the exhaustion, wear and tear on property used in the trade or business, including a reasonable allowance for obsolescence;

* * * * *

Revenue Act of 1926, 44 Stat. 9:

DETERMINATION OF AMOUNT OF GAIN OR LOSS.

SEC. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the

excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

(b) In computing the amount of gain or loss under subdivision (a)—

(1) Proper adjustment shall be made for any expenditure or item of loss properly chargeable to capital account, and

(2) The basis shall be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion which have since the acquisition of the property been allowable in respect of such property under this Act or prior income tax laws; * * *

* * * * *

BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, * * *

* * * * *

NET LOSSES.

SEC. 206. (a) As used in this section the term "net loss" means the excess of the deductions allowed by section 214 or 234 over

the gross income, with the following exceptions and limitations:

* * * * *

(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

(e) If for the taxable year 1923 a taxpayer sustained a net loss within the provisions of the Revenue Act of 1921, or if for the taxable year 1924 a taxpayer sustained a net loss within the provisions of the Revenue Act of 1924, the amount of such net loss shall be allowed as a deduction in computing net income for the two succeeding taxable years to the same extent and in the same manner as a net loss sustained for one taxable year is, under this Act, allowed as a deduction for the two succeeding taxable years.

(f) If a taxpayer makes return for a period beginning in one calendar year (hereinafter in this subdivision called "first calendar year") and ending in the following calendar year (hereinafter in this subdivi-

sion called "second calendar year") and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then his net loss for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a net loss for the entire period, determined under the law applicable to the first calendar year, which the portion of such period falling within such calendar year is of the entire period; and (2) the same proportion of a net loss for the entire period, determined under the law applicable to the second calendar year, which the portion of such period falling within such calendar year is of the entire period.

* * * * *

Section 234 (a) (4) and (7) of the Revenue Act of 1926 contains provisions identical with the corresponding section of the Revenue Act of 1924.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 143. *Loss of useful value.*—When, through some change in business condition, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis and the salvage value of the property. In determining the amount of the loss, adjustment must be made, however, for improvements and for depreciation. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires

proof of some unforeseen cause by reason of which the property has been prematurely discharged, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories or to other than capital assets. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be charged off on the books and fully explained in returns of income.

ART. 161. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value,

will, at the end of the useful life of the property in the business, equal the basis of the property determined in accordance with section 204 and articles 1591–1603. Due regard must also be given to expenditures for current upkeep.

ART. 166. *Obsolescence.*—With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property *may* become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and cannot be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due.

Articles 143, 161, and 166 of Treasury Regulations 69 contain provisions identical with the corresponding articles above of Treasury Regulations 65.

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IN THE

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OCTOBER TERM, 1941.

No. 351.

ANHEUSER-BUSCH, Incorporated,
Petitioner,

v.

LOUIS J. BECKER, Collector of Internal Revenue for the First United States Collection District of Missouri,
Respondent.

And Companion Cases.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

QUESTIONS PRESENTED.

The Brief for the Respondent in Opposition, states as the first question presented the following (Br. in Op. p. 4): "Whether Anheuser-Busch, Inc., and its predecessor were entitled, under Section 234 (a) (7) of the Revenue Acts of 1924 and 1926 to deductions in 1924 and 1925 *in excess of those allowed by the Commissioner* on account of obsolescence of the cases and bottles." (Italics ours.)

In so far as such statement implies that the Commissioner at any time made an allowance for "obsolescence"

of the Bevo cases and bottles *here in controversy* it is erroneous.

Respondent adverts (Br. in Op. pp. 11, 16-17) to allowances made by the Commissioner for cases and bottles sold or damaged beyond repair, but such cases and bottles were not included in the write-offs here in controversy. The equipment here involved was identified by its storage in specified locations, and consisted exclusively of cases and bottles which were in sound and usable condition (R. 581). Respondent also adverts to allowances in respect of 12-ounce and 7-ounce cases and bottles, which can have no possible relevancy here inasmuch as all of the equipment here involved was 10-ounce equipment.

The only "allowances" of any kind conceivably attributable to the equipment here involved were the so-called "depreciation" allowances computed and allowed in prior years upon a per trip basis. Since such allowances in respect of bottles had been based upon breakage, abrasion and loss (R. 582), they were not attributable to the bottles here involved which survived the hazards of manufacture and shipment and which, by being stored, were removed from such hazards. Allowances for depreciation of the cases were given consideration in the write-off of 1924. If, as estimated, the stored cases had made an average of two trips each, the depreciation considered in the write-off corresponds exactly with the depreciation "allowed" in prior years. The District Court so found (R. 582).

It follows that upon the record presented there was no recovery, through allowances made by the Commissioner, of any portion of the cost of the particular equipment in controversy excepting to the extent of $74,987.70 depreciation on cases considered in the write-off of 1924. The loss remains unreflected in income unless the deductions here involved be allowed.

ARGUMENT.

I.

Point I of respondent's argument (Br. in Op. pp. 13-17), dealing with petitioners' claim for allowances on account of obsolescence under Section 234 (a) (7), attempts to disparage the importance of reasons II, III and IV relied upon by petitioners for the allowance of the writ (Pet. pp. 22-23, c. f. Sup. Br. pp. 33-37) by insisting either that the Circuit Court of Appeals did not make the holdings alleged to conflict with the decisions of this court, or that it did not base its decision upon such holdings.

By so doing the respondent in effect acknowledges that the important elements in this case are not legalistic but factual, and brings into focus the primary point made by the petitioners that the Circuit Court of Appeals disregarded essential undisputed facts of the case and the findings of the District Court based thereon.

Note, if the court please, the degree in which the express holdings of the Circuit Court of Appeals are subordinated in respondent's brief in opposition. Although the Circuit Court of Appeals stated (R. 1157) that "the reasons for denying deduction are similar" to those in *Real Estate Land Title and Trust Company v. United States*, 309 U. S. 13,—and the primary reason given by this Court in the latter case for the disallowance was that the loss there was not functional and did not result from external causes,—respondent now asserts (Br. in Op. pp. 12-13, n. 8) that the Circuit Court of Appeals did not hold that the changed regulation (permitting the introduction of dealcoholized beer) and resulting competition was not such a cause as would permit of a deduction for obsolescence under Section 234 (a) (7). Although the Circuit Court

of Appeals (R. 1150, 1160) deemed it necessary in reaching its conclusion to reject the finding of the District Court that the assets had been abandoned, respondent now asserts (Br. in Op. p. 13) that the point of abandonment was not the major point on which the decision turned. Although the Circuit Court of Appeals declared (R. 1148) that Section 234 (a) (7) "contemplates that the annual depreciation deductions shall take into consideration both the physical life of the property and its useful life",—and, inferentially, contemplates no allowances for accrued and unanticipated obsolescence (cf. R. 1152)—respondent asserts (Br. in Op. pp. 14-15) that "the court below, however, did not rest its decision on the ground that obsolescence must be spread over more than one year."

If the respondent is in error in his subordination of the importance, in the Circuit Court of Appeals' decision, of the points adverted to, then Reasons II, III and IV for the allowance of the writ fully justify assumption of jurisdiction by this court.

On the other hand, if the respondent is correct in his interpretation of the decision of the Circuit Court of Appeals, then this is a fact case and the Circuit Court of Appeals so far disregarded the facts as found by the District Court that supervisory jurisdiction is clearly called for.

That this is a fact case is virtually conceded by the respondent in his statement (Br. in Op. p. 15) that the Circuit Court of Appeals in substance held "that the taxpayer had not established that the obsolescence of the cases and bottles in controversy was sustained in the years 1924 and 1925, respectively."

Upon such issue, was it not of importance to consider whether, when Bevo was superseded, there were other ex-

pected uses for the equipment which rendered it impossible then to determine that it had lost, or was losing, its usefulness? Was it not of importance to examine into the effect, upon the status of the equipment, of the development (at substantial outlays of capital) of the new products, Ginger Ale, Grape Bouquet and Carcho, which were to be marketed in Bevo bottles? Was it not of importance to consider the schedule of sales of products moving in Bevo bottles which was adopted as part of the findings of the District Court (R. 620)? Was it not of importance to reach a conclusion upon the question when, considering the history of the industry, reasonable men would conclude that the new products were failures and that usefulness of the equipment had for all purposes terminated?

The opinion of the Circuit Court of Appeals reflects no adequate consideration of these questions and deals with the case as if the facts upon which we chiefly relied were not in it. It rules that there was no accrual of obsolescence in the tax years.

It should be remembered that at the very time that Bevo sales were undergoing their decline, and long before the accumulation, through returns from the trade, of the surplus supplies of Bevo cases and bottles had been completed, plans (thereafter promptly put into effect) were being laid for the introduction of new products, in the production of which it was expected that the Bevo equipment would be used. As early as 1920 authority for sales of equipment was withdrawn in view of the probable need of the equipment for bottling Ginger Ale (R. 422). It was not until the end of 1921 that the cases and bottles ceased to accumulate in large numbers, and not until the end of 1923 that the maximum accumulation of bottles occurred (R. 614-615). Thus at the very time of its accumulation the status of the equipment became bound up with the destiny of the new products.

We have urged that equipment rendered unusable in prior years for the marketing of the superseded product, Bevo, (but reserved in good faith, and with reasonable expectations of use, for the marketing of other products), became unusable, i. e., obsolete, *for all purposes* when those other products failed. The theory of allocation of the losses to the years 1924 and 1925 was that a reasonable length of time should, in view of the expected use, be accorded for ascertainment whether there would in fact be a loss, and that those years spelled the passing of such reasonable period of time.

Respondent, in urging that the record does not support the premises upon which our theory of retarded obsolescence rests, avers (Br. in Op. p. 17) that "until 1932 attempts to find uses for the cases and bottles continued." Respondent should know from the findings of the District Court elicited by his own requests, that the only new products offered for sale in Bevo cases and bottles after 1924 were several medicinal products not expected to sell in great volume (R. 617). The introduction of these medicinal products did not constitute an "attempt" to find use for the surplus supplies of equipment previously written off.

The issue gets down to this: When was it reasonable to conclude that the introduction in 1921 and 1922 of the new beverages would not result in the use of the surplus supply of cases and bottles? Despite the development of those new products, total shipments in Bevo equipment continued in 1924, after three years experience with the new products, to decline (R. 620). The decision of the management in 1924 and 1925 that the stored equipment would not be used was a fair and reasonable conclusion from the facts and figures, and, in the light of subsequent events, was proved correct by the undisputed fact that the stored equipment was never used again (R. 582).

II.

Under Point II of respondent's argument (Br. in Op. pp. 18-20) dealing with petitioners' claim for allowances for loss of useful value under Section 234 (a) (4), respondent enumerates the requirements of Article 143 of Regulations 65, which he asserts have not been met. Only by an effective lock-out of a portion of the record facts, can respondent reach such conclusion under the remaining facts.

> "1. The deduction is applicable to cases in which the loss of useful value is brought about through a change in business conditions."

Respondent concedes (Br. in Op. p. 19) that a change in business conditions brought about the permanent decline of Bevo sales which resulted in the accumulation of surplus stocks of equipment, but avers that this change did not take place in 1924 or 1925. We note no requirement of the regulation that a "change in business conditions" take place *in the year* of the asserted loss. It would indeed offend economic law and common sense to assume that the effect (loss of useful value) necessarily takes place coincident with the operative cause.

Let us suppose that Anheuser-Busch, Incorporated, had attained large scale production in, for example, Grape Bouquet, and, through such production, had put the stored equipment into use. There would then have been no loss of useful value. Clearly the loss cannot be attributed to the year of the "change in business conditions" when at that time there was no determined loss. It must be attributed to a later year when the loss was capable of establishment.

> "2. The deduction is limited to cases in which the usefulness of capital assets is suddenly terminated."

In urging that there was no abrupt termination of the usefulness of the property in either 1924 or 1925, respondent relies upon the fact that actual use had terminated earlier, thus treating "usability" and "use" as synonymous. Such treatment completely overlooks the fact that, in years prior to the tax years, the equipment was in good faith reserved for use, and overlooks the contention that uselessness could not be ascribed to it until it was demonstrated by experience that it could not be used. The equipment ceased to be useful when the products for which it was reserved failed. Whether such failure was demonstrable in 1924 or 1925 is an issue to which respondent refrains from addressing himself, and an issue which was completely overlooked by the Circuit Court of Appeals.

> "3. The taxpayer must discontinue the business or discard the property permanently from use."
>
> "4. The loss must be claimed for the year in which the taxpayer discontinues the business or discards the property."

The assertion by respondent that the assets were not discarded until many years later (Br. in Op. p. 19) implies rejection of the District Court's finding (R. 582) that they were discarded in the tax years. In respect of this finding, we refer to the discussion at pp. 39-41 of our supporting brief. Unless discarding implies sale or destruction,—a view wholly untenable in view of the cases cited at p. 37 of our supporting brief,—Anheuser-Busch, Incorporated, did all that could be reasonably required to evidence its permanent discarding of the property by having removed it from its production facilities (R. 582) and by not in fact ever using the property after it was written off (R. 582).

> "5. Any loss resulting from gradual processes for which depreciation deductions are authorized may not be allowed as loss of useful value."

It is conceded, we assume, that the loss here in controversy was not capable of anticipation and inclusion in depreciation deductions.

Unless the deductions here in controversy be allowed, the fact of the loss which occurred will remain unrecognized. That a loss occurred cannot be doubted. Whether it occurred in the tax years is the real issue. Primarily because the Circuit Court of Appeals failed to give effect to the essential facts upon which the District Court's conclusions were based, this Court is asked to exercise its supervisory power.

Respectfully submitted,

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